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No. 79-1000

In the Supreme Court of the United States

OCTOBER TERM, 1979

ZEEV DICHNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-21) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 1979. The petition for a writ of certiorari was filed on December 26, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 31 U.S.C. 1101 violates the Fifth Amendment privilege against compulsory self-incrimination by requiring individuals to report the transportation out of the United States of monetary instruments in an amount exceeding $5,000.

STATUTE INVOLVED

31 U.S.C. 1101 provides in pertinent part as follows:

(a) Except as provided in subsection (c) of this section [relating to common carriers], whoever, whether as principal, agent, or bailee, or by an agent or bailee, knowingly—

(1) transports or causes to be transported monetary instruments—

(A) from any place within the United States to or through any place outside the United States, or
* * *

(2) receives monetary instruments at the termination of their transportation to the United States from or through any place outside the United States in an amount exceeding $5,000 on any one occasion shall file a report or reports in accordance with subsection (b) of this section.

(b) Reports required under this section shall be filed at such times and places, and may contain such of the following information and any additional information, in such form and in such detail, as the Secretary may require:

(1) The legal capacity in which the person filing the report is acting with respect to the monetary instruments transported.

(2) The origin, destination, and route of the transportation.

(3) Where the monetary instruments are not legally and beneficially owned by the person transporting the same, or are transported for any purpose other than the use in his own behalf of the

person transporting the same, the identities of the person from whom the monetary instruments are received, or to whom they are to be delivered, or both.

(4) The amounts and types of monetary instruments transported.

STATEMENT

After a non-jury trial on stipulated evidence in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring to violate 31 U.S.C. 1059 and 1101 by transporting approximately $2,000,000 in monetary instruments out of the United States without filing the required reports, in violation of 18 U.S.C. 371. Petitioner was fined $10,000 and sentenced to 18 months' imprisonment, all but three months of which was suspended in favor of unsupervised probation. The court of appeals affirmed (Pet. App. 1-21).

The evidence established that in August 1976 petitioner met Joseph Hauser, who operated a number of companies that provided health care insurance to labor unions (Pet. App. 4). Hauser was interested in transporting out of the United States money apparently stolen from a fund allocated for the payment of health and welfare claims of union members (*ibid.*), About one month later petitioner, on behalf of Hauser, approached a former business associate and asked him if he knew someone who could secretly move some currency from the United States to Switzerland (*ibid.*). This contact recruited two more individuals, Rustamali Tejpar and Friedrich Jaeger, to participate in the scheme (*ibid.*). Jaeger shortly thereafter notified law enforcement officials of the planned transaction (*ibid.*).

The initial amount planned to be moved was $2,000,000 (Pet. App. 5). On October 6, 1976, after transactions at banks in New York and Los Angeles, petitioner and two others flew from Los Angeles to London, England, carrying a first installment of $375,000 in the form of a cashier's check endorsed in blank (Pet. App. 5-7), which was eventually presented for payment at a Swiss bank (*id.* at 7). No report was made of the transportation out of the United States of this check (Pet. App. 7).[1]

ARGUMENT

Petitioner argues that the disclosure requirements of 31 U.S.C. 1101 are unconstitutional because they require the reporting of potentially self-incriminating information in violation of the Fifth Amendment. The court of appeals correctly rejected petitioner's contention (Pet. App. 12-20) in an opinion on which we largely rely.

As this Court recognized in *California* v. *Byers*, 402 U.S. 424, 427-284 (1971) (plurality opinion), statutes compelling the disclosure of information, though they may create a potential for self-incrimination, are nonetheless constitutional when they advance legitimate social objectives and are not designed for the purpose of compelling self-incrimination. As *Byers* noted, an

[1]Reports required by 31 U.S.C. 1101 are generally to be filed with the customs officer at any Customs port at the time of entry or departure. 31 C.F.R. 103.25(b). The form which must be filled out is United States Customs Service form 4790. This form requires identification information such as name, address, and passport number, the type and amount of the currency, its destination and mode of transportation, and the identity and occupation of the person on behalf of whom, if any, the reporter is acting (Pet. App. 16).

organized society must impose some burdens on its citizens for disclosure of information (*ibid.*):

> It commands the filing of tax returns for income; it requires producers and distributors of consumer goods to file informational reports on the manufacturing process and the content of products, on the wages, hours, and working conditions of employees. Those who borrow money on the public market or issue securities for sale to the public must file various information reports; industries must report periodically the volume and content of pollutants discharged into our waters and atmosphere. Comparable examples are legion.

Under statutes such as the one challenged here, there is some possibility—often a very real one—that criminal offenses may be uncovered from required disclosures. But the "mere possibility of incrimination is insufficient" to require the conclusion that the statute violates the Fifth Amendment. *Id.* at 428. Rather, "a balance must be struck between the competing interests of the state and the individual" (Pet. App. 13). As was noted in *Byers*, in all of the cases in which the Court has struck down disclosure statutes on Fifth Amendment grounds, the offending statutes required disclosure only from a " 'highly selective group inherently suspect of criminal activities' and the privilege was applied only in 'an area permeated with criminal statutes'—not in 'an essentially noncriminal and regulatory area of inquiry.' " *Id.* at 130. Because 31 U.S.C. 1101 does not share the vice of these statutes and is designed to promote legitimate government interests, it does not violate the Fifth Amendment. See *California* v. *Byers*, *supra*; *Shapiro* v. *United States*,

335 U.S. 1 (1948); *United States* v. *Sullivan*, 274 U.S. 259 (1927).[2]

First, the reporting requirement of Section 1101 is directed at all persons travelling across the international borders of the United States with more than $5,000 in monetary instruments. Since the transportation of such amounts is neither illegal nor infrequent, it is clear that the reporting requirement is not addressed to "a highly selective group inherently suspect of criminal activities." Rather, the vast majority of those affected by the requirements of Section 1101 will not be involved in any related criminal activities. The statute thus poses no danger of incrimination to international travelers as a class and cannot fairly be said to be aimed at an inherently suspect group.

Second, the reporting requirement of Section 1101 does not involve an area "permeated with criminal statutes." There is ordinarily nothing unlawful about transporting large sums of money into or out of the United States. Any potential incrimination would of necessity concern only some underlying, unrelated

[2]The cases relied on by petitioner (Pet. 4-5) are distinguishable. In *Albertson* v. *SACB*, 382 U.S. 70 (1965), the challenged statute required registration of Communist Party members. The statute was thus targeted at a "highly selective group inherently suspect of criminal activities," and the disclosure would have incriminated the declarant under various federal statutes (*id.* at 77-79). Similar defects attended the statutes struck down in *Marchetti* v. *United States*, 390 U.S. 39 (1968), and *Grosso* v. *United States*, 390 U.S. 62 (1968) (requiring registration by gamblers, who were liable to prosecution in practically every state); *Haynes* v. *United States*, 390 U.S. 85 (1968) (involving registration requirements directed at unlawful possession of firearms); and *Leary* v. *United States*, 395 U.S. 6 (1969) (tax assessed on persons engaged in marijuana dealing which was unlawful in every state).

criminal transaction and not the act of transportation itself. Section 1101 does not require that the report reveal the nature of the transaction from which the funds are derived or their business purpose. As a result, in the general context to which the statute applies, "the risk of incrimination from the reporting statute is not substantial" (Pet. App. 17).

Moreover, as the court of appeals observed (Pet. App. 18), the disclosure requirement is supported by the significant nonprosecutorial interests of the government in monitoring the flow of currency across the nation's borders. The reports required under the Bank Secrecy Act are useful not only for criminal purposes, but also in "tax, or regulatory investigations or proceedings." 31 U.S.C. 1051. The House Report accompanying the legislation stated that (H.R. Rep. No. 91-975, 91st Cong., 2d Sess. 20 (1970)):

> "The purposes of title 11 [of which Section 1101 is a part] * * * are: (1) to facilitate the supervision of financial institutions properly subject to Federal supervision, (2) to aid duly constituted authorities in lawful investigations, and (3) to provide for the collection of statistics necessary for the formulation of monetary and economic policy."

[3]We are aware of, and petitioner cites, no other appellate decisions addressing the constitutionality of Section 1101 under the Fifth Amendment. The only other reported decision considering this question agreed with the court of appeals that the reporting requirements of 31 U.S.C. 1101 are constitutional. *United States* v. *San Juan*, 405 F. Supp. 686 (D. Vt. 1975), rev'd on other grounds, 545 F. 2d 314 (2d Cir. 1976).

The court of appeals properly concluded that these substantial non-prosecutorial interests outweigh the minimal risk of compelled self-incrimination and that the statute therefore does not violate the Fifth Amendment.

There is no conflict among the courts of appeals on the question presented in this case and further review by the Court at this time is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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